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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1355

MIDDLEWEST MOTOR FREIGHT BUREAU, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 433 F. 2d 212. The orders of the district court (Pet. App. 61a-68a, 69a-73a; App., *infra*, pp. 14-19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1970. A petition for rehearing was de-

nied on November 16, 1970. The petition for a writ of certiorari was filed on February 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon dissolution of a temporary restraining order entered in a suit by truckers to set aside an order of the Interstate Commerce Commission rejecting their proposed rate increases and dismissal of the suit, shippers may recover the excess charges paid as a result of the temporary restraining order.

STATUTES INVOLVED

Sections 316 (b), (d), (e) and (g) of the Interstate Commerce Act (49 U.S.C. 316) are set forth at Pet. App. 106a-109a. Subsection (j) of that section provides:

> Nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith.

STATEMENT

This suit was originally brought by interstate trucking carriers to set aside an order of the Interstate Commerce Commission disallowing certain rate increases. The shippers and the United States were also defendants.[1] A single-judge district court issued a temporary

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[1] The United States was a party to this case in two capacities. Since this suit was brought by the carriers against the Interstate Commerce Commission, the United States was a statutory defendant. Additionally, the United States intervened as a shipper. In the

restraining order enjoining the enforcement of the Commission's order pending a judicial hearing on a preliminary injunction before a three-judge district court. After the hearing, the three-judge court found that enforcement of the Commission's order should not be preliminarily enjoined and dissolved the temporary restraining order.

During the 17 days the temporary restraining order was in effect, the carriers charged the shippers the higher rates ordered cancelled by the Commission. The United States and the other shippers counterclaimed in the district court for recovery of the excess monies paid. The district court denied the counterclaims when the carriers' complaint was dismissed on the carriers' motion on the ground of mootness by reason of a new rate increase filed by the carriers and allowed to become effective. On appeal from the denial of the counterclaims, the court of appeals reversed, holding that the shippers were entitled to recover the excess rates paid as a result of the temporary restraining order.

1. *The Commission's cancellation order.* In 1963, the carriers published a tariff of increased trucking rates. The Commission ordered that the lawfulness of the proposed rates be investigated; it initially also suspended the new rates pending the investigation, but shortly thereafter permitted the new rates to go into effect during the investigation (Pet. App. 4a).

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present proceedings before this Court, the United States is involved only in its capacity as shipper.

After investigation, the Commission in February 1965 found that the carriers had not shown, as required by 49 U.S.C. 316(g), that the proposed increases were "just and reasonable" (Pet. App. 74a-100a), and ordered their cancellation (Pet. App. 96a). After granting several stays, the Commission set the effective date of this cancellation order as September 13, 1965 (Pet. App. 4a).

2. *The temporary restraining order.* On September 9, 1965, the carriers brought this suit in the District Court for the District of Minnesota to enjoin enforcement of the cancellation order (Pet. App. 5a). Judge Nordbye issued a temporary restraining order conditioned upon a $300,000 bond, pending a hearing before a three-judge court on whether a preliminary injunction should be issued (Pet. App. 5a, 62a-63a).[2] The private shippers, subsequently joined by the United States, intervened as defendants.

On September 24, 1965, the three-judge district court held a hearing on the carriers' motion for a preliminary injunction. After argument, the court orally denied the motion and stated that the temporary restraining order would be dissolved (Pet. App. 63a, 5a), but upon the carriers' request delayed until September 29 the entry of the formal order denying a preliminary injunction and dissolving the temporary restraining order (Pet. App. 5a, 63a). The three-judge court found that "plaintiffs have failed to convincingly demon-

[2] Under 28 U.S.C. 2325, a request for injunctive relief restraining the enforcement of an order of the Interstate Commerce Commission must be determined by a three-judge court.

strate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable" (App., *infra*, pp. 18-19).[3]

3. *The shippers' counterclaims.* The temporary restraining order had been in effect for 17 days (September 13 through September 29, 1965), during which time the carriers had been collecting charges in excess of those permitted by the Commission's cancellation order. The private shippers, later joined by the United States, filed counterclaims against the carriers for refund of the excess charges collected while the temporary restraining order was in effect. The private shippers estimated that the overcharges to them amounted to $70,000 per day for each of the 17 days, while the United States estimated it overpaid a total of at least $50,000 (Pet. App. 2a; affidavit of Collan attached to United States memorandum in support of leave to file counterclaim).

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[3] The carriers under the Interstate Commerce Act can only charge those rates contained in their published tariffs. 49 U.S.C. 317. Following the district court's ruling, the carriers made an immediate *ex parte* application to the Commission for time to publish tariffs to comply with the order of cancellation. On September 30, 1965, without changing the requirements of its prior order that the carriers cancel the rate increase, the Commission ordered that the carriers would have until October 11, 1965, to publish tariffs in compliance with the order of cancellation. The Commission also authorized the carriers to reestablish the rate that had been in effect prior to the challenged rates on one day's notice instead of the usual 30 days' notice. On October 11, 1965, the carriers published lower rates to comply with the Commission's order (Pet. App. 6a, 111a-112a).

4. *Dismissal of the complaint and the counterclaims.* Meanwhile, the carriers pursued an alternative course to obtain relief from the Commission's cancellation order—a course of action which had the effect of making their attack on that order moot. Under Commission practice, carriers, to set new rates, merely have to publish and file a new rate schedule with the Commission and give appropriate notice. The rates so filed automatically become effective unless the Commission suspends them. 49 U.S.C. 316(b), (g). See Pet. App. 70a-71a. If the rates are challenged, the carriers may create a new record to justify them. The carriers invoked this procedure and published new rates, effective November 16, 1965 (Pet. App. 6a). These rates—which were higher than the rates which had been cancelled by the Commission—were ordered investigated, but were not suspended by the Commission [4] and thus superseded the 1963 rates which were the subject of the Commission's cancellation order (Pet. App. 6a and n. 3).

The carriers then moved in the district court for dismissal of both their complaint attacking the Commission's cancellation order and the shippers' counterclaims, on the ground of mootness (Pet. App. 7a). The three-judge district court granted the motion and dismissed both the complaint and the counterclaims as moot, since the rates cancelled by the Commission's order had been superseded by new rates. With respect

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[4] New material, not before the Commission when it considered the 1963 increases, was submitted by the carriers to justify this increase of November 16, 1965. Supplemental Appendix in the court of appeals, pp. 17-20.

to the counterclaims, the district court reasoned that in light of the Commission's subsequently permitting larger rate increases to take effect than those subject to the cancellation order, it would be inequitable to make the carriers repay the shippers the difference between the higher rates charged from September 13 through 29, 1965, and the lower, pre-existing rates which would have been in effect had the Commission's order not been stayed by the district court [5] (Pet. App. 61a-68a, 69a-73a).

5. *The decision of the court of appeals.* The United States and the private shippers appealed from the district court's dismissal of the counterclaims.[6] In an extensive opinion reversing the district court, the court of appeals held that the United States and the private shippers were entitled to recover the excess charges made during the period of the temporary restraining

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[5] The district court decision is contained in two orders (Pet. App. 61a-68a, 69a-73a). Initially, on September 5, 1968, the district court denied the shippers' counterclaims on the ground that certain administrative action taken by the Commission on September 30, 1965 (see fn. 3, *supra*) was intended by the Commission *retroactively* to stay the effective date of its order from September 13, 1965, when it was otherwise scheduled to go into effect, until October 11, 1965. Upon timely motion of the shippers to amend the findings, and after submission of a statement by the Commission (Pet. App. 69a-71a) explaining that its September 30, 1965, ruling did not have a retroactive effect, the district court on April 9, 1969, modified its earlier order to omit reliance upon the retroactivity of the Commission's ruling.

[6] The private shippers also filed a direct appeal to this Court, which was dismissed for want of jurisdiction. *National Small Shipments Traffic Conference, Inc.* v. *Middlewest Motor Freight Bureau*, 396 U.S. 111.

order, and remanded the case for further proceedings on the counterclaims (Pet. App. 1a-60a).

The court of appeals noted that the effect of the Commission's order was to terminate the increased rates as of the effective date of the order (September 13, 1965), so that the immediately prior lower rates should have gone into effect on that date. The temporary restraining order issued by the district court, however, prevented the Commission's order from taking effect until after September 29, 1965, when the restraining order was dissolved. The court of appeals observed that in those circumstances, the district court had the duty to provide restitution to a party damaged by the issuance of the temporary injunction.

ARGUMENT

The court of appeals correctly weighed the equities in this complex proceeding and determined, in accordance with the principles articulated by this Court in *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, and *Ex parte Lincoln Gas Co.*, 256 U.S. 512, that the carriers owed a duty of restitution to the shippers for excess rates collected as a result of the temporary restraining order. There is no occasion for review of that decision, which rests in large part upon the facts of this particular case.

1. This Court has long recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to [control] that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St.*

Louis S.W. Ry. Co., supra, 249 U.S. at 145-146. In *Arkadelphia,* a carrier obtained a judicial order enjoining, pending a final court determination on the merits, lower freight rates set by a state agency. While the restraining order was in effect, the carrier charged shippers rates higher than those set by the rate order. Subsequently, the courts dismissed without prejudice for failure of proof the attack on the rate order and dissolved the injunction. Shippers who had paid the higher rates while the court's injunction was in effect sought a refund of the excess monies paid during the period. Finding restitution appropriate under the circumstances, this Court observed that when the carriers failed to sustain the validity of their rates, "they at the same time showed that the injunctions ought not to have been allowed." 249 U.S. at 144. The shippers were eligible for a refund under the principle "long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he lost thereby." 249 U.S. at 145.

In *Ex parte Lincoln Gas Co.,* 256 U.S. 512, this Court further elaborated on the principles of *Arkadelphia.* That case, like *Arkadelphia,* involved an injunction against a decree establishing lower rates, which injunction was eventually dissolved when the lower rates were sustained. This Court, again approving restitution of charges paid in excess of those set by the enjoined decree, noted that "the restraining order and temporary injunction were [entered] for the very pur-

pose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; * * *." 256 U.S. at 517 (emphasis added). See also *Public Service Commission* v. *Brashear Freight Lines,* 312 U.S. 621; *Baltimore & Ohio Railroad Company* v. *United States,* 279 U.S. 781, 785-786; *Inland Steel Co.* v. *United States,* 306 U.S. 153, 159.

In short, it is well settled that when a carrier invokes the process of a court to enjoin lower rates, and the court's temporary injunction is subsequently dissolved, the carrier has an "equitable duty" to refund to shippers the excess rates collected as a result of the court's process.

2. Petitioners (Pet. 9-16) assert that the principles of *Arkadelphia* are inapplicable where, as here, there has not been a judicial determination on the merits that the cancellation order of the Interstate Commerce Commission was valid. But contrary to the underlying assumption of this argument that an administrative order is not valid until upheld by a court, such an order is presumed valid until there has been a judicial determination to the contrary. *E.g., Interstate Commerce Commission* v. *City of Jersey City,* 322 U.S. 503, 512; *Ex parte Lincoln Gas Co., supra,* 256 U.S. at 518. "[T]he Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity." *Federal Power Commission* v. *Hope National Gas Co.,* 320 U.S. 591, 602.

The court of appeals correctly ruled (Pet. App. 10a)

that the lawfulness of the Commission's order cancelling the 1963 rate increases was not in issue in the proceedings on restitution. The question of the validity of those increases was rendered moot by the subsequent adoption of higher rates and the dispute over restitution involved only private parties and the United States as a shipper. In view of the complexity of the issues surrounding the Commission's cancellation order and the absence of the Commission as an interested party once the dispute over the actual rates to be charged in the future was terminated, it would have been inappropriate for the lower courts to have entertained direct attacks on the cancellation order in resolving the peripheral restitution dispute.

While the merits of the Commission's order have thus not been subjected to plenary review, the three-judge court did determine, subsequent to the issuance of the temporary restraining order, that there was not a substantial likelihood of the carriers prevailing on the merits (App., *infra,* pp. 18-19). Had the single-judge district court so recognized, it would not have issued the temporary restraining order. See, *i.e., Virginia Petroleum Jobbers Association* v. *Federal Power Commission,* 259 F.2d 921, 925 (C.A.D.C.).

3. Petitioners also assert that no restitution can be ordered because the Commission has not determined that the 1963 rates were unjust and unreasonable or exceeded maximum reasonable rates during the period the temporary restraining order was in effect; the measure of damages resulting from the temporary restraining order, petitioners contend, is therefore un-

known (Pet. 16-24). This argument, however, overlooks the fact that once the Commission had found in its February 1965 cancellation order that the carriers had failed to meet their burden of proving under 49 U.S.C. 316(g) that the 1963 increased rates were "just and reasonable," then from the effective date of that order, set by the Commission as September 13, 1965, it was unlawful for the carriers to charge such increased rates.[7] For the Act (49 U.S.C. 316(b) and (d)) imposes upon the carriers the duty to charge only just and reasonable rates.

Consequently, had petitioners not obtained the temporary restraining order from the district court, the carriers after September 13, 1965, could not have lawfully charged the rates set in the 1963 rate increase. And, they could not lawfully charge the rates set by their 1965 rate increase until its effective date, November 13, 1965. Thus, the temporary restraining order permitted them to charge for the 17 days from September 13 to September 29 rates which, but for the temporary restraining order, they could not lawfully have charged. Upon dissolution of the temporary restraining order, equity requires that the shippers be reimbursed for the extra charges above the preexisting rates which they had to pay because of the temporary restraining order. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Railroad Company, supra; Inland Steel Co.* v. *United States, supra; Ex parte Lincoln Gas Co., supra.*[8]

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[7] This case does not present the issue whether the Commission's determination meant that it was also unlawful for the carriers to keep the revenue from the increased rates charged by the carriers prior to the Commission's ruling. See Pet. App. 14a-15a.

[8] The carriers rely on *Atlantic Coast Line Railroad Company,*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

L. PATRICK GRAY, III,
Assistant Attorney General.

ALAN S. ROSENTHAL,
ROBERT E. KOPP,
Attorneys.

APRIL 1971.

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v. *Florida,* 295 U.S. 301, 302, where a claim for restitution by shippers was denied. In that case, the Commission had found existing rates charged by a railroad to be so low as to be discriminatory and had ordered an *increase.* The rate increase went into effect following the Commission's order after a district court had refused to invalidate the order. The Commission's order, however, was subsequently set aside by this Court on the ground the Commission had failed to make appropriate findings. Following this Court's decision, the Commission reopened its proceeding, made proper findings, and again found that the existing rates were discriminatory. The Commission's order this time was upheld. The shippers meanwhile filed a restitution suit to recover the difference between the lower rates and the higher rates charged in the period between the first Commission order and its reversal by this Court. This Court held that in equity and good conscience the shippers should not be permitted restitution. The Court pointed out that the carriers had merely been charging the increased rates in obedience to a Commission order. 295 U.S. at 311. Furthermore, the second Commission decision "had cured the defects in the form of its earlier decision." *Id.* This Court observed that to allow restitution would be to enforce rates which had been found to be discriminatory, 295 U.S. at 311-312, and were less than compensatory. 295 U.S. at 313. None of these equitable factors leading to a denial of restitution is present in the instant case.

APPENDIX

Order of September 29, 1965

In the
United States District Court
For the District of Minnesota
Fourth Division

4-65 Civ. 285

Middlewest Motor Freight Bureau, et al., Plaintiffs, vs. United States of America and Interstate Commerce Commission, Defendants, and The National Small Shipments Traffic Conference, Inc., et al., Intervenors, and Wisconsin Manufacturers Association, Intervenors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR TEMPORARY INJUNCTION

This cause came on for hearing before this three-judge Court on September 24, 1965, upon motion by plaintiffs for an interlocutory injunction. Plaintiffs appeared by Harold C. Evarts, Esq., George D. Michalson, Esq., and Roland Rice, Esq. Defendants appeared by Sidney P. Abramson and Neil F. Convery, Assistant United States Attorneys for the District of Minnesota. The Interstate Commerce Commission appeared by Robert S. Grisvold, Esq. Intervenors Wisconsin Manufacturers Association appeared by Philip H. Porter,

Esq. All other intervenors appeared by John J. C. Martin, Esq., Larry R. Henneman, Esq., and Michael P. Sullivan, Esq.

The Court having heard the arguments of counsel, having considered the affidavits submitted, on all the files, records and proceedings herein makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I

This is a proceeding to review the determination of the Interstate Commerce Commission (hereinafter referred to as "The Commission") in the proceeding designated as I and S Docket M-17450, *LTL Class Rates & Minimum Charges Between Midwest and Central Territories,* wherein the Commission determined that certain schedules for increases in less-than-truckload class rates and minimum charges filed with the Commission were "not shown to be just and reasonable." Those schedules established increased rates and charges on class-rated, less-than-truckload shipments between, to, and from points in Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, South Dakota, West Virginia, Wisconsin, and Wyoming. By stipulation of the parties concerned, the Commission's order also embraces such rates and charges on shipments moving between Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin on the one hand, and Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma, Tennessee,

and Texas on the other hand. Such schedules became effective on July 1, 1963. By Order of the Commission, Board of Suspension dated June 26, 1963, such schedules were suspended. By Order of the Commission dated August 8, 1963, the said order dated June 26, 1963, was vacated and set aside as of September 7, 1963. By report and order dated February 24, 1965, the Commission ordered the scheduled increases to be cancelled finding "that the proposed increases are not shown to be just and reasonable." By subsequent orders the Commission postponed the date for compliance with the report and order of February 24, 1965, to September 13, 1965.

II

The Middlewest Motor Freight Bureau is a corporation organized under the laws of the State of Missouri and is a trade association and tariff publishing agent for some 1,200 motor common carrier members including the motor carrier plaintiffs herein.

III

On September 9, 1965, the United States District Court for the District of Minnesota made its temporary restraining order restraining and enjoining the Interstate Commerce Commission from enforcing its said order of February 24, 1965, and thereafter modified by subsequent orders, and suspending the operation of said order of February 24, 1965. On September 20, 1965, after noticed hearing on September 16 and 17, 1965, said Court made its order extending said tem-

porary restraining order pending a determination of plaintiffs' motion for interlocutory injunction.

IV

On September 24, 1965, this three-judge Court heard and considered the arguments of counsel relative to plaintiffs' motion for an interlocutory injunction.

V

Plaintiffs contend that the report and order of the Commission dated February 24, 1965, is unlawful on various grounds, such as being unsupported by the evidence, arbitrary, capricious, and an abuse of discretion, and that the Commission's findings represented an ex post facto application of revised standards as to the nature of the evidence required to justify the rate increases, but the plaintiffs primarily urge that their showing before the Commission justified a finding that, without the proposed increase, the operating ratio of many, if not most, of the carriers involved, would exceed 93 per cent, which the Commission had theretofore found to be reasonable.

VI

The Commission found that the evidence before it submitted by the carrier plaintiffs was of little probative value to support the proposed operating rates submitted to it, and on the hearing before this Court on the motion for an interlocutory injunction, this Court finds that the plaintiffs have failed to establish by any persuasive showing that the Commission had done any-

thing more in applying new standards to the record submitted, than to scrutinize with greater care the surveys which the carriers had promulgated in support of the proposed increased rates.

VII

This Court further finds on the showing before it

(a) That plaintiffs had reasonable notice of the alleged new standards which the Commission allegedly promulgated and which pertained to the degree of proof necessary to sustain the surveys made by the carriers in support of the proposed increase of rates.

(b) That plaintiff carriers involved herein have adequate administrative remedies which will enable them to proceed with proposed new increased rates already filed with the Commission, or to proceed by timely filing with the Commission new proposed increase of rates.

(c) That the balancing of the equities in considering the magnitude of the losses and injury to the public if the interlocutory injunction is granted and if the Commission's order is sustained by the Court, as compared with the losses to the carriers if the injunction is not granted, with the remote possibility of the Commission's order being set aside, adequately justifies this Court, on this showing, in denying the motion for an interlocutory injunction.

(d) That plaintiffs have failed to convincingly

demonstrate that there is any basis for concluding that there is a reasonable probability that this Court will overrule the Commission's order in its finding that the proposed rate increases are not shown to be just and reasonable.

CONCLUSIONS OF LAW

1

The plaintiffs are not entitled to an interlocutory injunction, and plaintiffs' motion therefor should be and hereby is denied.

2

The temporary restraining order herein dated September 9, 1965, as extended by order dated September 20, 1965, should be and hereby is dissolved.

Dated this 29 day of September, 1965.

HARRY A. BLACKMUN
Harry A. Blackmun
United States Circuit Judge

EDWARD J. DEVITT
Edward J. Devitt
United States District Judge

GUNNNAR H. NORDBYE
Gunnar H. Nordbye
United States District Judge

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